Supreme Court, U.S.
FILED
MAR 9 1992
OFFICE OF THE CLERK

No. 91-758

In the Supreme Court of the United States

OCTOBER TERM, 1991

PONCIANO CRUZ RASA, OSCAR CRUZ RASA, AND LEO SABLAN PANGELINAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal wire fraud statute and the Hobbs Act apply to the Commonwealth of the Northern Mariana Islands.

2. Whether the length of the continuance granted on the government's unopposed motion violated petitioners' rights under the Speedy Trial Act.

3. Whether the district court properly showed additional leniency in sentencing petitioners Ponciano and Oscar Rasa, but not petitioner Pangelinan.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-5a, is unpublished, but the judgment is noted at 924 F.2d 1063 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1991. A petition for rehearing was denied on September 11, 1991. Pet. App. 10a. The petition for a writ of certiorari was filed on November 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the District Court for the Northern Mariana Islands on two counts of wire fraud, in violation of 18 U.S.C. 1343, and two counts of extortion, in violation of 18 U.S.C. 1951 (Hobbs Act). Petitioners Ponciano and Oscar Rasa entered conditional guilty pleas to both wire fraud counts, reserving their right to appeal an alleged violation of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* Petitioner Leo Pangelinan was convicted after a jury trial on both extortion counts. The Rasas were each sentenced to three years in prison and a $1000 fine. Pangelinan was sentenced to concurrent terms of five years in prison and fined $10,000. The court of appeals affirmed. Pet. App. 1a-5a, 12a; C.A. Excerpts of Record 44.

1. On March 17, 1988, petitioners were indicted on charges of extortion and wire fraud in the District Court for the Northern Mariana Islands. On July 18, 1988, the district court, on the government's motion, dismissed the indictment for irregularities in the grand jury selection. On April 21, 1989, a newly constituted grand jury reindicted petitioners on two counts of extortion and two counts of wire fraud. Gov't C.A. Br. 2-3.

The second indictment charged that petitioners—a Senator of the Commonwealth of the Northern Mariana Islands, his brother and political adviser, and a consultant to the Commonwealth's Senate Committee on Resources, Development and Programs—engaged in a scheme to obtain kickback payments from Japanese businesses in exchange for petitioners' agreement to assist (or at least not to hurt) those businesses in their efforts to secure construction contracts from the Commonwealth. Pet. 3; Pet. App. 57a-70a. In connection with the scheme, petitioners

went to Japan to solicit a $165,000 bribe. Pet. App. 57a. Petitioners also caused wire transmissions to pass between New York and the Northern Mariana Islands, directing payments to be made to one of the Japanese firms. Pet. App. 60a-62a.

2. Based on its conclusion that the Speedy Trial Act would require trial to start within two days of the second indictment, the government moved for a continuance on the grounds that it would serve the "ends of justice" under 18 U.S.C. 3161(h)(8)(A). Pet. App. 3a; Gov't C.A. Br. 2-3. On May 18, 1989, the district court orally granted the government's motion after finding that defense counsel and the prosecution would not otherwise have reasonable time to prepare and that a miscarriage of justice might result. Pet. App. 20a. Counsel for petitioners expressly noted their lack of objection. Pet. App. 20a, 27a. After determining the availability of counsel, the court set trial for September 6, 1989, again without objection from petitioners. Pet. App. 22a-24a. Petitioners later moved to dismiss on the ground that the trial did not commence within the 70-day period required by the Speedy Trial Act of 1974, but the court denied their motion on the grounds explained in its earlier oral ruling. Pet. App. 6a-9a.

3. On September 1, 1989, the Rasas entered conditional guilty pleas under Fed. R. Crim. P. 11(a)(2), reserving their right to appeal the denial of their motion to dismiss. Pursuant to their plea agreements, the Rasas were each sentenced to three years in prison and fined $1000. Pangelinan, however, elected to go to trial. A jury acquitted him of the wire fraud charges, but found him guilty of the two extortion counts. He was sentenced to concurrent terms of five years' imprisonment and was fined $10,000. In explaining the basis of the sentencing disparity between

the Rasas and Pangelinan, the district court noted that cooperation with the government through the entry of a guilty plea should be reflected in sentencing. The court expressly stated, however, that it was not penalizing Pangelinan for exercising his right to a jury trial. Pet. App. 12a, 14a.

4. The court of appeals affirmed. Citing Fed. R. Crim. P. 11(a)(2), the court declined to consider several claims that petitioners Ponciano and Oscar Rasa had not reserved in writing in their conditional guilty pleas (including their claims that the wire fraud statute and Hobbs Act do not apply to the Commonwealth). Pet. App. 2a n.1. The court also held that the district court had properly granted the continuance, reasoning that it had made sufficient findings to satisfy the requirements of the Speedy Trial Act. Pet. App. 3a-4a. Finally, the court rejected Pangelinan's claim that he had received a more severe sentence than the Rasas because he exercised his right to a jury trial; the court relied on the district court's statement that it was not punishing Pangelinan for going to trial, but was giving the Rasas credit for pleading guilty. Pet. App. 4a-5a.

ARGUMENT

1. Petitioners contend the indictment failed to charge an offense because it was based on federal statutes—the wire fraud statute, 18 U.S.C. 1343, and the Hobbs Act, 18 U.S.C. 1951—that do not apply to the Northern Mariana Islands. Pet. 9-13.[1] Those

[1] This issue was raised for the first time on appeal, and only by petitioners Ponciano and Oscar Rasa. The court of appeals did not reach the issue on the ground that the Rasas had not preserved the claim in writing as part of their conditional plea agreement. Pet. App. 2a n.1. Petitioners contend, Pet. 14, that the court's unpublished opinion misapplied prior

statutes, however, extend to petitioners' offenses through Section 502 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (CNMI Covenant), Pub. L. No. 94-241, 90 Stat. 268 (1976) (*reprinted in* 48 U.S.C. 1681 note).[2] Section 502(a)(2) applies to the Northern Mariana Islands those laws "which are applicable to Guam and which are of general application to the several States as they are applicable to the several States." *Ibid.* Because the wire fraud statute and the Hobbs Act "are of general application to the several States" and apply to Guam, they apply to the Northern Mariana Islands.

Ninth Circuit cases holding that a guilty plea does not waive jurisdictional challenges. See, *e.g.*, *United States* v. *Caperell*, 938 F.2d 975, 977 (9th Cir. 1991). Even if such a claim otherwise merited this Court's review, but see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), it would not warrant further review here because the indictment in fact charged an offense.

[2] At the conclusion of World War II, the United States was designated "trustee" of the Northern Mariana Islands pursuant to an agreement with the Security Council of the United Nations. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. That trusteeship agreement gave the United States full powers of legislation over the territory and authorized the application of "such of the laws of the United States as it may deem appropriate to local conditions and requirements." Art. 3, 61 Stat. 3302. On March 24, 1976, Congress approved the present Covenant to establish the Commonwealth in political union with the United States. See Pub. L. No. 94-241, 90 Stat. 263. The CNMI Covenant's provisions were phased in over time. CNMI Covenant, § 1003. Section 502 took effect on January 9, 1978. Proclamation No. 4534, 42 Fed. Reg. 56,593, 56,594 (1977). The trusteeship agreement officially terminated in November 1986. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986).

Petitioners contend, Pet. 11-13, that neither the wire fraud statute nor the Hobbs Act applies to the Northern Mariana Islands because those Acts are based on the Commerce Clause, U.S. Const., Art. I, § 8, Cl. 3, which is not one of the provisions of the Constitution that is specifically made applicable to the Northern Mariana Islands. See CNMI Covenant, § 501(a).[3] But the Covenant does not invalidate congressional legislation that was originally based on a constitutional provision that is not specifically referred to in the Covenant. Rather, the question of which federal statutes apply to the Northern Mariana Islands is addressed in Section 502(a) of the Covenant, 90 Stat. 268, which makes applicable to the Northern Mariana Islands all generally applicable laws that were in effect as of that section's effective date; in Section 105, 90 Stat. 264, which defines Congress's power to enact laws applicable to the Northern Mariana Islands;[4] and in Section 102, 90 Stat. 264,

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[3] Section 501(a) provides in pertinent part:

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26 * * *.

90 Stat. 267.

[4] Section 105 provides in pertinent part:

> The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named

which provides that federal laws "applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands." Because both the wire fraud statute and the Hobbs Act were in force at the time the Covenant became effective, they apply to the Northern Mariana Islands through Section 502(a).

Although petitioners rely heavily, Pet. 11, on *Hillblom* v. *United States*, 896 F.2d 426 (9th Cir. 1990), that case actually supports the result here. In *Hillblom*, the court rejected the plaintiffs' contention that three existing federal statutes—the Swine Health Protection Act, 7 U.S.C. 3801 *et seq.*, the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, and the Shipping Act of 1984, 46 U.S.C. 1701 *et seq.*—could not validly be applied to the Northern Mariana Islands because they were enacted under the authority of the Commerce Clause and the Territory Clause. 896 F.2d at 431 n.3 ("None of these acts was enacted in derogation of [the plaintiffs'] rights under the Covenant."); see *A & E Pac. Constr. Co.* v. *Saipan Stevedore Co.*, 888 F.2d 68, 71 (9th Cir. 1989) (applying the Shipping Act of 1984); *Micronesian Telecommunications Corp.* v. *NLRB*, 820 F.2d 1097, 1100-1101 (9th Cir. 1987) (NLRA). Thus, *Hillblom* and other decisions of the court of appeals contradict petitioners' assertion that the wire

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> therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant * * * may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

90 Stat. 264.

fraud statute and the Hobbs Act violate the CNMI Covenant because they are Commerce Clause statutes.[5]

2. Petitioners claim that the district court violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, by excluding from the Speedy Trial Act computation that period during which the court continued the trial. Pet. 15-26.

The Speedy Trial Act generally requires a trial to commence within 70 days "from the filing date * * * of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. 3161(c)(1). The Act directs the district court to exclude the following period in computing the time within which a trial must begin:

> Any period of delay resulting from a continuance * * *, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

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[5] Petitioners also suggest that the prosecutions for official bribery violated the CNMI Covenant's guarantee of self-governance. Pet. 12-13. Petitioners' unsupported assertion that a prohibition against wire fraud and official bribery impermissibly intrudes into the Commonwealth's system of self-governance, as reflected in its "law and custom," Pet. 13, is without merit and does not warrant this Court's review.

18 U.S.C. 3161(h)(8)(A). The factors that a district court may consider in excluding time under Section 3161(h)(8)(A) include whether the failure to grant such a continuance "would be likely to * * * result in a miscarriage of justice," 18 U.S.C. 3161(h)(8)(B)(i), or "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence," 18 U.S.C. 3161(h)(8)(B)(iv). A court may not toll the 70-day period by granting a continuance based on "general congestion of the court's calendar." 18 U.S.C. 3161(h)(8)(C).

The district court properly granted a continuance pursuant to Section 3161(h)(8). The government moved for a continuance because the Speedy Trial Act otherwise would have required trial to begin two days after the second indictment was filed. Gov't C.A. Br. 3. The government's motion accordingly requested that the court continue the trial for a sufficient period to allow defense counsel and the government a reasonable opportunity to prepare for trial. *Id.* at 5. After confirming that petitioners had no objection to the government's motion, Pet. App. 20a, the court granted the motion and set forth its reasons as required by the Act:

> The Court agrees that neither defense counsel nor the attorney for the government would have reasonable time necesary for effective preparation, taking into account the exercise in due diligence to prepare this case. Also, it would be unreasonable to expect adequate preparation in only the two days suggested. It would limit it and a miscarriage of justice might result, and therefore

> coupled with the fact that there is no opposition from the defense counsel, the motion is granted.

Pet. App. 20a.[6]

Petitioners do not contest the district court's decision to grant a continuance, Pet. 22, but contend that the September 6, 1989, trial date was unjustified because defense counsel were prepared to go to trial on July 17. Pet. 17-18, 22-24. The court, however, properly took into account the availability of counsel and the court in setting the trial for September 6. At the May 18, 1989, hearing, petitioners advised the district court that the earliest they could be prepared was July 17, 1989. Pet. App. 22a. The judge noted that he was going to be absent from the island on that date, and suggested starting the trial three days later. *Id.* at 21a-23a. Starting the trial on July 20, however, would have pushed an anticipated two-week trial into August 1989, and petitioner Pangelinan's counsel was unavailable during that entire

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[6] Because the court contemporaneously set forth detailed reasons for granting the government's motion, petitioners err in relying, Pet. 25, on cases that require contemporaneous findings under Section 3161(h)(8)(A). Although the court did not, in terms, state that "ends of justice * * * outweigh the best interest of the public and the defendant in a speedy trial," the court complied with the requirements of the statute by stating its reasons for so concluding. See 18 U.S.C. 3161(h)(8)(A). Indeed, the court's decision explicitly relied on two of the factors enumerated in Section 3161(h)(8)(B). See *United States* v. *Studnicka*, 777 F.2d 652, 658 n.20 (11th Cir. 1985). In any case, the government's motion asserted that the ends of justice would outweigh the best interest of the public and petitioners in a speedy trial, Gov't C.A. Br. 3; that unopposed motion and the court's order granting it must be viewed as complementary acts. See *United States* v. *Bruckman*, 874 F.2d 57, 61-62 (1st Cir. 1989).

month. *Id.* at 23a. In view of those factors, the court set a September 6, 1989, trial date, and counsel for all three petitioners explicitly noted their lack of objection to that date. *Id.* at 24a.

The court's selection of that date complied with the Speedy Trial Act. The Act contemplates the continuity of counsel as a reason for granting a continuance. See, *e.g.*, *United States* v. *Jones*, 712 F.2d 1316, 1323 (9th Cir.), cert. denied, 464 U.S. 986 (1983); *United States* v. *Scott*, 784 F.2d 787, 789 (7th Cir.), cert. denied, 476 U.S. 1145 (1986). Thus, the court properly took the unavailability of counsel into account. See, *e.g.*, *Scott*, 784 F.2d at 789; *United States* v. *Nance*, 666 F.2d 353, 357-358 (9th Cir.), cert. denied, 456 U.S. 918 (1982); *United States* v. *Edwards*, 627 F.2d 460, 461 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 872 (1980); *United States* v. *New Buffalo Amusement Corp.*, 600 F.2d 368, 374 (2d Cir. 1979).[7] Although the court contributed to the delay because the trial judge was not on the island on July 17 and could not start the trial until July 20, it was not improper to exclude time based on the court's availability. It is true that a continuance may not be based solely on general congestion in the court's calendar. 18 U.S.C. 3161(h)(8)(C). But there is nothing in the record to suggest that the judge's absence in this case had anything to do with congestion in the court's docket or the press of judicial business. The Speedy Trial Act contemplates that judicial unavailability, if

[7] While the district court could have severed the trial of petitioners Ponciano and Oscar Rasa from the trial of petitioner Pangelinan, petitioners apparently made no motion to sever. Even if they had, the question whether to continue the trial as to all three petitioners or grant a motion to sever would have been within the district court's discretion. See *Jones*, 712 F.2d at 1323.

unrelated to the general congestion of the courts, may in some circumstances justify an ends-of-justice continuance. See, *e.g.*, *United States* v. *Savoca*, 739 F.2d 220, 224 (6th Cir. 1984) (illness of judge), reh'g granted on other grounds, 761 F.2d 292 (6th Cir.), cert. denied, 474 U.S. 852 (1985); *Nance*, 666 F.2d at 358 n.11 (same). Petitioner has not cited, and we are unaware of, any decision holding that a judge's temporary absence from the jurisdiction cannot be grounds for a reasonable continuance under Section 3161(h)(8)(A).[8]

Finally, petitioners not only failed to object to the government's motion for a continuance, Pet. App. 24a, 27a, but also played a crucial role in determining the duration of the continuance through defense counsel's representations concerning their preparedness and availability, *id.* at 21a-24a. While petitioners cannot waive a speedy trial objection, their conduct in this case went beyond mere waiver of their speedy trial rights. Because petitioners were active participants in producing the delay of which they now complain, the district court properly declined to dismiss

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[8] In *United States* v. *Crane*, 776 F.2d 600 (6th Cir. 1985), upon which petitioner relies, Pet. 23, the trial judge set the trial for July 5, 1984, because he was leaving the country on June 21, 1984, and upon his return, would be presiding over another trial lasting until July 3, 1984. 776 F.2d at 602. The speedy trial date was June 22, 1984. *Ibid.* In finding that the judge's absence did not justify a continuance, the court of appeals reasoned that his "unavailability was caused at least partially by his presiding over another case and was therefore attributable to 'general congestion of the court's calendar.'" *Id.* at 605. Thus, the court of appeals specifically declined to rely on the judge's absence from the country in finding that his unavailability was not a proper basis for a Section 3161(h)(8)(A) continuance.

their indictments based on that delay. See, *e.g.*, *United States* v. *Kucik*, 909 F.2d 206, 211 (7th Cir. 1990), cert. denied, 111 S. Ct. 791 (1991); *United States* v. *Gallardo*, 773 F.2d 1496, 1506 (9th Cir. 1985).

3. Petitioner Pangelinan contends that the district court improperly sentenced him more severely than his co-defendants because they pleaded guilty and he exercised his right to a jury trial. Pet. 26-29. He relies, Pet. 26-27, on the trial court's observation that a defendant's sentence should reflect his level of co-operation with the judicial system, including the entry of a guilty plea.

A sentencing court may not punish a defendant for exercising his right to trial. See, *e.g.*, *United States* v. *Carter*, 804 F.2d 508, 513 (9th Cir. 1986). But a court may, consistent with the Constitution, show leniency to those who plead guilty, which extends a substantial benefit to the government and may indicate that a shorter time frame is needed for rehabilitation. *Brady* v. *United States*, 397 U.S. 742, 752-753 (1970).[9] Thus, a grant of leniency to those co-defendants who cooperate with the government and display contrition for their crimes is not a penalty to others who exercise their right to stand trial. See, *e.g.*, *United States* v. *Brown*, 761 F.2d 1272, 1278 (9th Cir. 1985); *United States* v. *Thompson*, 476 F.2d 1196, 1201 (7th Cir.), cert. denied, 414 U.S. 918 (1973).

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[9] That principle is reflected in the United States Sentencing Guidelines. See, *e.g.*, Sentencing Guidelines § 3E1.1 (acceptance of responsibility). Because the offenses in this case occurred before November 1, 1987, the Guidelines were not applicable to petitioners' sentences.

The district court in this case did not penalize petitioner Pangelinan, but merely showed greater leniency to his two co-defendants, who pleaded guilty. The court expressly stated that it "was not the intention of the court to punish Mr. Pangelinan for using his constitutional right of going to trial." Pet. App. 14a. The court further observed that the maximum sentence for petitioner Pangelinan's offenses was 20 years in prison and that concurrent five-year sentences for his two counts of conviction were "certainly not excessive." *Ibid.* Finally, the court found that Pangelinan had not been candid with the jury. *Ibid.* On this record, the court of appeals properly held that the disparity in sentences did not reflect a penalty against Pangelinan for going to trial, but rather reflected a credit to his co-defendants for cooperating with the government by pleading guilty.[10]

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[10] The cases on which petitioner Pangelinan relies, Pet. 28-29, do not help him. In *United States* v. *Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982), the trial court sentenced the defendant to the statutory maximum after noting that he "was just thumbing his nose at our judicial system" by seeking a trial. Similarly, the district court in *United States* v. *Hutchings*, 757 F.2d 11, 13-14 (2d Cir.), cert. denied, 472 U.S. 1031 (1985), imposed the maximum sentence because the defendant "was clearly and unquestionably guilty, and there should have been no trial." And in *United States* v. *Stockwell*, 472 F.2d 1186, 1188 (9th Cir.), cert. denied, 411 U.S. 948 (1973), the court informed the defendant that he would receive a sentence of three years if he pleaded guilty, but five to seven years if he went to trial; the defendant asserted his jury trial right and was sentenced to seven years after being convicted. Unlike the present case, none of those decisions addressed a sentencing disparity that reflected the acceptance of responsibility by some but not all of the defendants.

In any case, petitioner Pangelinan does not contest the validity of applicable Ninth Circuit case law, but claims that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

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the unpublished ruling of the court of appeals conflicts with the law of the circuit. Pet. 28. That claim of intra-circuit conflict does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

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